No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

The business community has a particular interest in the interpretive principles applied to federal regulations. Given the breadth of government regulations, virtually every Chamber member has at least some portion of its business regulated by federal agencies. These businesses have a strong interest in seeing the Court revisit its decisions giving deference to agencies' interpretations of their regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties were timely notified of *amicus's* intent to file this brief and consented to its filing.

The Chamber also has an interest in this case because it involves a veteran who was wrongly denied disability benefits. The Chamber actively supports veterans through "Hiring Our Heroes," a nationwide initiative launched in March 2011 to help veterans, transitioning service members, and military spouses find meaningful employment opportunities. *See* About Hiring Our Heroes, https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited July 31, 2018). To date, more than 31,000 veterans and military spouses have obtained employment opportunities through Hiring Our Heroes events. And more than 505,000 veterans and military spouses have been hired by more than 2,000 companies as part of the "Hiring 500,000 Heroes" campaign. *Id.* Given its commitment to supporting veterans, the Chamber has an interest in ensuring that veterans like Petitioner do not have their rights abridged by vacillating agency interpretations of regulations.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The canonical formulation of *Auer* deference is that [the Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part, dissenting in part). The Court "offered no justification whatever" when it adopted this interpretive rule. *Id.* And in recent years, several justices have expressed interest in reconsidering the rule because it involves an improper delegation of authority, creates incentives for agencies to adopt vague regulations, and disrupts reasonable

expectations of regulated parties.[2] This case presents the opportunity for the Court to revisit *Seminole Rock* and *Auer*. It should grant the petition and overrule those decisions.

I. The business community generally benefits from laws that are clearly written and consistently applied. When agencies adopt regulations through notice-and-comment rulemaking, businesses are given an opportunity to shape the regulatory landscape in which they operate. When the notice-and-comment rulemaking process functions properly, regulated companies receive fair notice of what conduct is required or prohibited and are able to order their operations accordingly.

Auer deference harms the business community by encouraging agencies to adopt vague regulations that they can later interpret however they see fit. This practice upsets the expectations of regulated parties without the notice provided through formal rulemaking. When agencies adopt vague regulations, businesses must attempt to predict how the agency will interpret those regulations and also how likely the agency is to change that interpretation in the future. Businesses also have a more difficult time tracking an agency's shifting interpretations. Regulated companies cannot learn of changes to their regulatory obligations simply by reading the Federal Register

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[2] *See Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

because the agency is just as likely to change its interpretation of a vague regulation by, for example, filing an *amicus* brief.

II. This Court should grant certiorari and overrule *Seminole Rock* and *Auer*. These decisions conflict with the Administrative Procedure Act ("APA"), violate separation-of-powers principles, and are unsupported by policy considerations. *Auer* deference conflicts with the plain language of Section 706 of the APA, which requires "the *reviewing court* [to] ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added). *Auer* deference violates separation-of-powers principles because interpreting ambiguous laws is a judicial function that courts must perform. Courts cannot delegate this authority to executive agencies. Policy considerations do not support continued adherence to *Seminole Rock* and *Auer* either. The Court has previously justified *Auer* deference based on agencies' expertise in determining the intent of ambiguous agency regulations. But an agency's policy preferences, which are always subject to change, should play no role in the purely interpretive task of deciding what an existing law means.

III. This case is an excellent vehicle for the Court to reconsider *Seminole Rock* and *Auer*. The Federal Circuit's decision turned on application of *Auer* and contained no alternative ground for its holding. Thus, the petition squarely and cleanly presents the question whether *Seminole Rock* and *Auer* should be overruled.

ARGUMENT

I. *Auer* Deference Harms The Business Community By Increasing Regulatory Uncertainty.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To ensure that federal regulations comply with this fundamental principle, the APA generally requires agencies to engage in notice-and-comment rulemaking before issuing substantive, binding regulations. *See* 5 U.S.C. § 553(b); 38 U.S.C. § 501(d) ("The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants or benefits under a law administered by the Secretary."). Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Notice-and-comment rulemaking provides businesses with an important opportunity to help shape the administrative decisions that govern their industries. Every decision that a business makes—from hiring employees and opening new facilities to marketing and selling its products—requires an assessment of the legal implications of that decision. When notice-and-comment rulemaking is used, businesses have the opportunity to present evidence to support regulations that make sense for their industries. And

even when a regulated company's views are not reflected in the final regulations, the company still benefits from having participated in the process because it gains a better understanding of the standards by which its conduct will be judged.

Seminole Rock and *Auer* undermine the important role played by notice-and-comment rulemaking. As the Court has explained, *Auer* deference encourages agencies to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

The business community is harmed by this approach to rulemaking. When agencies promulgate vague regulations that they can interpret later in a myriad of ways, companies have difficulty predicting what conduct is required or prohibited. Under *Auer*, it is not enough for a regulated entity to hire "an army of perfumed lawyers and lobbyists" to determine the fairest reading of vague regulations or to seek guidance from the agency. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "Even if the [regulated party] somehow manage[s] to make it through this far unscathed, [it] must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Id.*

Seminole Rock and *Auer* also harm regulated companies by making it difficult to keep track of an agency's shifting views. When agencies engage in notice-and-comment rulemaking, they publish proposed rules in the Federal Register, and regulated parties

know that they must watch the Federal Register for proposed rulemakings that could affect them. But tracking an agency's interpretations of vague regulations is considerably more challenging because those interpretations could appear almost anywhere. For example, in *Auer*, the Court deferred to an agency interpretation advanced for the first time in an *amicus* brief. 519 U.S. at 461; *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). The Court also has deferred to one agency's interpretation of another agency's regulation. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991). The *Auer* doctrine has created a world in which businesses must scour court dockets, *amicus* briefs, agency websites, letters sent to other companies, and other agencies' policies to fully understand the regulatory regime in which they operate.

In *Christopher*, the Court took an important step to limit *Seminole Rock* and *Auer* by refusing to defer to an agency's interpretation of ambiguous regulations that "impose[d] potentially massive liability ... for conduct that occurred well before that interpretation was announced." 567 U.S. at 155–56. But *Christopher* has not eliminated *Auer*'s adverse effects on businesses. Even after *Christopher*, courts continue to defer to agency interpretations that upset the reasonable expectations of regulated parties. For example, the Seventh Circuit recently deferred to a novel agency interpretation that made a loan guaranty agency liable for breach of contract. *See Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639, 650 (7th Cir. 2015); *see also id.* at 663 (Flaum, J., concurring in part and concurring in the judgment) (confirming that outcome depended on application of

Auer). The agency announced its interpretation for the first time in an *amicus* brief, and the court applied *Auer* deference even though the agency's interpretation was "at odds with the regulatory scheme [and] defie[d] ordinary English." *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari); *see also Bible*, 799 F.3d at 663 (Manion, J., concurring in part and dissenting in part) ("Applying the Department's *post hoc* rule to USA Funds is both wrong and unjust."). And the Federal Circuit recently deferred to the Army's mid-game rule change in a contractual dispute despite the "textually dubious" nature of the Army's interpretation. *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting).

In short, *Auer* deference encourages agencies to adopt vague regulations that they can later interpret, and re-interpret, through informal interpretive guidance. This approach to rulemaking creates great uncertainty for the business community and others who benefit from clear regulations that provide fair notice of what is required or prohibited.

II. *Seminole Rock* And *Auer* Should Be Overruled.

Seminole Rock and *Auer* cannot be reconciled with the text of the APA, defy the Constitution's separation of powers, and cannot be justified by policy considerations. They should be overruled.

A. *Seminole Rock* And *Auer* Are Contrary To The APA.

The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability

of the terms of an agency action." 5 U.S.C. § 706.[3] Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring). Despite the Court's contrary holdings in *Seminole Rock* and *Auer*, the APA makes clear that it is "the responsibility of the court to decide whether the law means what the agency says it means." *Id.*

The Court has never attempted to reconcile *Auer* deference with the text of the APA or similar statutes. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Id.* Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. *See id.* Because *Seminole Rock* and *Auer* conflict with the APA, those decisions are not sufficiently "well reasoned" for the Court to continue following them. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

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[3] The statutory requirement that courts, rather than agencies, interpret regulations applies equally to the VA. *See* 38 U.S.C. § 502 (providing that review of VA rules "shall be in accordance with chapter 7 of title 5"); *see also* 38 U.S.C. § 7261(a)(1) (requiring the Court of Appeals for Veterans Claims to "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary"); 38 U.S.C. § 7292(d)(1) (requiring Federal Circuit to "hold unlawful and set aside any regulation or any interpretation thereof" it finds to be "an abuse of discretion, or otherwise not in accordance with law").

B. *Seminole Rock* And *Auer* Violate Separation-Of-Powers Principles.

Even putting aside Section 706, *Seminole Rock* and *Auer* should be overruled because they violate separation-of-powers principles. By giving "controlling weight" to most agency interpretations, courts "violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). *Auer* deference also flouts the Constitution's guarantee that cases and controversies will be decided by "neutral decisionmakers who will apply the law as it is, not as they wish it to be." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). In so doing, *Auer* deference "undermines 'the judicial "check" on the political branches' by ceding the courts' authority to independently interpret and apply legal texts." *Garco Constr., Inc.*, 138 S. Ct. at 1052 (Thomas, J., dissenting).

This case demonstrates the threat to separation-of-powers principles posed by *Seminole Rock* and *Auer*. During the adjudication of a veteran's benefit claim, the agency advanced an interpretation of its own regulation that caused Petitioner to lose approximately 23 years of retroactive benefits. *See* App. 14a-15a & n.10. The Federal Circuit deferred to the agency's interpretation despite recognizing that Petitioner had advanced a reasonable interpretation of the ambiguous term in the regulations. *See* App. 16a.

"This type of conduct 'frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government,'" *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting), resulting in "precisely the abuse[] that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring); *see also Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (The Founders knew "that, when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.").

C. *Seminole Rock* And *Auer* Cannot Be Justified On Policy Grounds.

Policy considerations do not support continued adherence to *Seminole Rock* and *Auer*. The Court has justified *Auer* deference based on agencies' purported expertise in divining the true intent of ambiguous regulations. *See, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991). That flawed rationale cannot sustain the doctrine.

Policy expertise may be relevant to an agency's decision to adopt particular regulations, but that expertise is irrelevant to the purely interpretive task of resolving ambiguity in those regulations. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring) ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means."). And even if the intent of the original drafter of the ambiguous regulations could be determined, that subjective intent should carry no weight. The ambiguity should instead be re-

solved by determining the best reading of the regulation based on the traditional tools of interpretation. *See id.* at 1222–23; *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 472–73 (1989) (Kennedy, J., concurring) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation ...."); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.").

* * *

In short, *Seminole Rock* and *Auer* should be overruled.

III. This Case Is An Excellent Vehicle To Reconsider *Seminole Rock* And *Auer*.

This case provides a good opportunity for revisiting *Seminole Rock* and *Auer*. Unlike other recent cases,[4] the Federal Circuit did not suggest that it would have reached the same result without applying *Auer* deference. To the contrary, the Federal Circuit expressly stated its holding as an application of *Auer* deference. It explained that it would "defer to an

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[4] *See, e.g., Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 453 (1st Cir. 2013) (Lynch, C.J., for an equally divided en banc court) ("We stress that *Auer* deference is not necessary to our conclusion. . . . Indeed, we would agree with the United States' interpretation even if we gave it no deference at all."); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 890 (D.C. Cir. 2015), *cert. denied* 137 S. Ct. 618 (2017) ("Even without [*Auer*] deference, we have no difficulty upholding the FAA's interpretation of its regulations in this case.").

agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'" App. 15a. It then held both that the regulation at issue was ambiguous and that the Board's interpretation did not "strike [the court] as either plainly erroneous or inconsistent with the VA's regulatory framework." App. 17a. Nothing in the opinion suggests that the court of appeals thought that the VA had adopted the best reading of the challenged regulation.

This Court has declined to reconsider *Seminole Rock* and *Auer* in recent cases where the issue was not sufficiently briefed. *See, e.g., Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case. But this is not that case."). Inadequate briefing will not be an issue here. The petition focuses primarily on the question whether *Seminole Rock* and *Auer* should be overruled, and thus the briefing will be focused on this important question "going to the heart of administrative law." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring).

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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